83 - 2011
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WILLIAM O. NISHIBAYASHI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether statements are material under federal perjury and false declarations law when the statements are merely filed in affidavits in an administrative body or tribunal in which no proceedings or deliberations are or have been conducted.

2. Whether the trial court denied Petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States when it refused to grant a hearing on Petitioner's motion for vindictive and selective prosecution based on facts uncovered during trial.

LIST OF PARTIES AFFECTED

The trial in District Court and the Appeal to the United States Court of Appeals for the Ninth Circuit were consolidated with *United States v. Ralph Torres,* DC No. CR 82-01795-1 and CA No. 83-1174.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, William O. Nishibayashi, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. The judgment of the United States District for the District of Hawaii is attached hereto as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on May 7, 1984. This Petition

for Writ of Certiorari was filed within sixty days of that date pursuant to Rule 20.1, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under Section 1254(1), Title 28 United States Code.

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

This case involves the United States Constitution, Fourteenth Amendment, Section 1, the United States Code, Title 18, Section 1001 and Section 1621 and Rule 12(b)(2) of the Federal Rules of Criminal Procedure, all of which are set forth in the Appendix. (Appendix C, D, E and F)

STATEMENT OF THE CASE

On or about January 16, 1981 a charge was filed against Local 745 of the United Brotherhood of Carpenters and Joiners of America (hereafter "Local 745") alleging unfair labor practices in violation of Section 8(b)(7)(c) of the National Labor Relations Act (hereafter "Act") by the General Labor Association with the National Labor Relations Board (hereafter "NLRB"). Another charge by the same association was filed on January 30, 1981 with the NLRB against Local 745.

After an investigation of the alleged charges, the NLRB conducted an investigation and filed a petition for an injunction in the District Court pursuant to Section 10(1) of the Act. An order to respond by affidavits to the allegations of the petition was directed to Local 745 by the District Court. In answer to the petition, Local 745 attached affidavits which were the basis for the indictment, trial and conviction in this case.

At the hearing in Civil No. 81-49, District Court of the District of Hawaii regarding the petition by the NLRB for an injunction the court dismissed the petition for failure of the NLRB to attach supporting affidavits.

The NLRB filed another petition for injunction in the District Court following the dismissal of the first petition, the subsequent case was designated as Civil No. 81-69. The District Court dismissed the matter with prejudice prior to the determination of the allegations in the petition on the rule of res judicata.

After the dismissal of Civil No. 81-69, the NLRB filed a motion for reconsideration of the dismissal and a third petition for an injunction in the District Court designated as Civil No. 81-153. The motion and the hearing on the petition were scheduled but before any hearing was had on either the motion or petition the initial matter in the NLRB was settled by the parties without any administrative hearings.

Although the same affidavits had been filed in the NLRB by Local 745, the matter was settled prior to any proceedings being commenced in that agency. The NLRB was attempting to obtain an injunction prior to any administrative hearing although its investigation on the priority issue was conducted before the affidavits were filed.

On February 4, 1983 Petitioner was indicted for perjury in violation of Section 1621, Title 18 of the United States Code (Appendix E) and for false declarations in violation of Section 1001, Title 18, U.S.C. (Appendix D) for statements in said affidavits.

Trial commenced on May 9, 1983. On Friday morning, May 12, 1983, Petitioner made an oral request for Jencks material which the District Court granted giving the government time to tender the documents by Saturday afternoon, May 13, 1983.

One of the documents tendered that afternoon was an affidavit of Walter Mungovan, the chief government's witness and whose company was the object of the picketing in the first instance. The affidavit was not part of the discovery requested materials tendered by the government prior to trial.

On Monday, May 16, 1983, prior to trial resuming, Petitioner moved for a dismissal based on vindictive prosecution and selective prosecution pursuant to the matters stated in the affidavit. The District Court ruled that the motion was not a proper vindictive prosecution motion, was untimely and denied the motion.

On May 23, 1983 Petitioner was found guilty of three counts of perjury and one count of false declaration. Petitioner filed a timely appeal of the judgment on July 15, 1983, which judgment was a final order pursuant to Rule 38 of the Federal Rules of Criminal Procedure. The jurisdiction of the United States Court of Appeals, Ninth Circuit is under Section 1291, Title 28, U.S.C.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT DECISION NOT ONLY CONFLICTS WITH ITS OWN PRIOR OPINIONS BUT WITH OTHER CIRCUITS IN THE CONSTRUING OF MATERIALITY IN PERJURY PROSECUTION

The Ninth Circuit's decision in affirming the District Court's determination of "materiality" of the statements in this case establishes without reason a new rule in the prosecution of perjury that conflicts with its own prior opinions and other circuit's opinion. The new rule created condones the prosecution for perjury in instances when those statements *could have affected the deliberations of the administrative bodies or tribunals even if no deliberations were had.* This rule departs from the usual course of judicial proceedings in the nation.

In its decision, the Ninth Circuit cites the test for materiality in *United States v. Anfield,* 539 F.2d 674, 677-678 (9th Cir. 1976) being whether the false testimony has a tendency to influence, impede, or hamper a tribunal from pursuing its investigation.

In *Anfield* the defendant testified differently at the grand jury proceedings than at the subsequent trial. The test for materiality depended on the statements made at the grand jury proceedings and depended on its affect on the grand jurors. The *Anfield* decision required that the perjured testimony be given in a competent tribunal and that the testimony be material to the cause which is being deliberating therein.

In *United States v. Kelly*, 540 F.2d 990, 993 (9th Cir. 1976) the defendant testified at a grand jury session and was later prosecuted for perjury for statements made at the grand jury proceedings. The Ninth Circuit stated that it be sufficient for the government to prove that the testimony was relevant to any issue under consideration by the grand jury. See also *United States v. Ponticelli*, 622 F.2d 985 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980).

Perjury prosecution in the other circuits follow the above cases by allowing prosecution for perjury of statements made at the tribunal and which were material to the deliberations of the tribunal, Fifth Circuit, *United States v. Whimpy*, 531 F.2d 768 (5th Cir. 1976). *United States v. Giarratana*, 622 F.2d 153 (5th Cir. 1980); Second Circuit, *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1971); Tenth Circuit, *United States v. Masters*, 484 F.2d 1251 (10th Cir. 1973); Third Circuit, *United States v. Lardieri*, 497 F.2d 317 (3rd Cir. 1974); Seventh Circuit, *United States v. Howard*, 560 F.2d 281 (7th Cir. 1977); see also 22 A.L.R. Fed. 379.

The cases cited stand for the proposition that the statements are material if made at a prior proceeding affecting the deliberations of that tribunal on any issue therein.

The Ninth Circuit decision in this matter conflicts with the established law by allowing the prosecution of perjury for statements merely filed in tribunals in which no proceedings are held and in which no deliberations were conducted.

II

THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S MANDATE IN THE APPLICATION OF THE RULES OF CRIMINAL PROCEDURE

Petitioner's motion on vindictive prosecution and selective prosecution was based on facts uncovered during trial. The District Court summarily dismissed the motion as being untimely under Rule 12(b)(2), Rules of Criminal Procedure (Appendix F) and the Ninth Circuit affirmed.

In *Fallen v. United States,* 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964) this court held that the Rules of Criminal Procedure should not be rigid and inflexible irrespective of the circumstances. In *Fallen* the defendant missed a filing of an appeal by five days, but because of special circumstances in that case this Court reversed the Court of Appeals' decision of not allowing the appeal.

The Ninth Circuit, without concern to the circumstances peculiar to this case and in conflict of this Court's mandate in *Fallen,* affirmed the trial Court's actions without comment, on the following authorities, *United States v. Jones,* 712 F.2d 1316, (9th Cir. 1983) *cert. denied,* 104 S. Ct. 434 (1983); *United States v. Oaks,* 508 F.2d 403 (9th Cir. 1974). The authorities cited merely state the rule that such motions are pre-trial motions without mentioning the circumstances mandated in *Fallen* and therefore should be controlling in this case.

Only after commencement of trial in this case was Petitioner able to make a motion based on vindictive or selective prosecution. The trial court by denying a hearing to Petitioner summarily on the motion on procedural grounds violated the spirit of the Rules of Criminal Procedure and strips Petitioner of due process (Appendix C), especially in light of *Fallen.*

CONCLUSION

In view of the presentation set forth above, we respectfully submit that this petition for writ of certiorari is meritorious and should be granted.

Dated: Honolulu, Hawaii, May , 1984.

Respectfully submitted,

LLOYD Y. ASATO
Attorney for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 83-1172
DC No. CR 82-01795-2

No. 83-1174
DC No. CR 82-01795-1

United States of America,
Appellee,
v.
William O. Nishibayashi,
Appellant.
United States of America,
Appellee,
v.
Ralph Torres,
Appellant.

[Filed May 7, 1984]
MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
David W. Williams District Judge, Presiding
Argued and submitted March 29, 1984
Before: CHOY, GOODWIN and KENNEDY,
Circuit Judges

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit except as provided in Rule 21(c).

Nishibayashi and Torres, union officials, were convicted for making false statements concerning a labor dispute. We affirm.

I. Torres and Nishibayashi

1. Two witness rule

The falsity of a defendant's statements must be proven either by the testimony of two witnesses or the testimony of one witness, plus corroborating evidence. *United States v. Davis,* 548 F.2d 840, 843 (9th Cir. 1977). The corroborating evidence need not be independently sufficient to establish guilt, and it may be circumstantial in nature. *Id.* Under the *Davis* test there is adequate corrobration of the falsity of all of Torres' and Nishibayashi's statements.

2. Materiality

Nishibayashi and Torres argue that their false statements were not sufficiently material to support conviction. However, the test for materiality is broad—whether the false testimony has a tendency to influence, impede, or hamper a tribunal from pursuing its investigation. *United States v. Anfield,* 539 F.2d 674, 677-678 (9th Cir. 1976). In all proceedings, the issue was the union's intent in picketing. The statements were material to this assessment.

3. Oath—authorization by law

Nishibayashi's and Torres' oaths were authorized by "a law of the United States," as required by the perjury statute, 18 U.S.C. § 1621. A "law of the United States" as used in the perjury statute includes duly authorized rules with a clear legislative base. *United States v. Hvass,* 355 U.S. 570, 575 (1958) (local rule of a district court qualifies as "a law of the United States"). The Federal Rules of Civil Procedure therefore qualify as a "law of the United

States." Fed. R. Civ. P. 43(e) provides that when a motion is based on facts not appearing of record, the court may hear the matter on affidavits. *Black's Law Dictionary* 54 (5th ed. 1979) defines affidavit as

> A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

It follows that Nishibayashi and Torres took oaths in a "case in which a law of the United States authorizes an oath to be administered . . . ." 18 U.S.C. § 1621.

4. Judge Heen

In *United States v. Woodley,* 726 F.2d 1328 (9th Cir. 1983), *rehearing en banc pending,* this court found that as a recess appointee to the federal bench, Judge Heen could not exercise the judicial power of the United States. Nishibayashi and Torres argue that their false statements did not constitute perjury because no judge was involved in the proceeding in which they were made. But, none of the parties had reason to question Judge Heen's capacity at the time. Their intent and act of making a false statement under oath (not administered by Judge Heen) are unchanged by Judge Heen's subsequent disqualification. The falsehoods' insult to the judicial process remains. Moreover, nothing in the language of the perjury statute turns on Judge Heen's disqualification. Finally, they were convicted in proceedings not presided over by Judge Heen. Accordingly, this argument is without merit.

II. Nishibayashi

5. Vindictive and selective prosecution

Nishibayashi's claims of vindictive and selective prosecution are barred because they were not raised prior to trial. Fed. R. Crim. P. 12(b); *United States v. Jones,* 712 F.2d 1316, 1323-24 (9th Cir.) *cert. denied,* 104 S.Ct. 434 (1983) (vindictive prosecution); *United States v. Oaks,* 508 F.2d 1403, 1404-05 (9th Cir. 1974) (selective prosecution).

III. Torres

6. Formality

Torres complains that the district court erred in rejecting his jury instruction that an oath requires certain formalities. No specific formalities are required. Fed. R. Evid. 603; *United States v. Yoshida,* 727 F.2d 822 (9th Cir. 1983). Moreover, the instruction actually given and Torres' proposed instruction differ only in the most trivial ways. There was no error.

7. Sufficiency of the evidence

The district court did not err in refusing Torres' motion for a new trial based on the weight of the evidence. Looking at the evidence in the light most favorable to the government, *see Yoshida,* there was sufficient evidence that Watanabe administered an oath to Torres as to the truth of Torres' affidavits. There is also abundant evidence that Torres lied in his statement to the NLRB.

8. Surrebuttal by Swain

Torres complains that the district court erred in not allowing recall of witness Swain in surrebuttal after Mungovan's comment about torching. Evidentiary rulings will be overturned only for abuse of discretion. *United States v.*

Rohrer, 708 F.2d 429, 432 (9th Cir. 1983). Because defense counsel proffered that Swain would only repeat his prior testimony, the district court did not abuse its discretion.

9. Duplicity in the indictment

Because Torres did not raise the claim of duplicity in the indictment before trial, it is waived. Fed. R. Crim. P. 12(b)(2). *Cf. United States v. Kennedy,* 726 F.2d 546 (9th Cir. 1984) (duplicity claim considered on appeal when raised and denied before trial).

10. Withholding of material evidence

Torres claims that the district court abused its discretion in failing to grant a new trial because the government withheld material which was allegedly discoverable under *Brady v. Maryland,* 373 U.S. 83 (1963). Because the omitted evidence fails to create a reasonable doubt about Torres' guilt which did not otherwise exist, *United States v. Agurs,* 427 U.S. 97, 112 (1976); *United States v. Gross,* 603 F.2d 757, 759 (9th Cir. 1979), the district court did not abuse its discretion.

11. False testimony

Torres' charge that the government knowingly introduced false testimony is without merit. Torres shows only conflicting testimony by different witnesses.

12. Witnesses Cestare and Hamilton

Any error in admitting the testimony of witnesses Cestare and Hamilton was not prejudicial because of the abundant other evidence of falsehood. Fed. R. Crim. P. 52(a); *Rohrer,* 708 F.2d at 432.

13. Counts 7 and 10

Counts 7 and 10 charged Torres with stating: "I [Torres] am not aware of any person related to Local 745 that has forced or asked any individual or employer to refuse to perform any work for C & W Construction." Torres claims that this language refers only to third persons. However, Torres was a person related to Local 745, and there was clear evidence that Torres forced and asked people not to perform work for C & W. The jury reasonably could have found that the language "any person related to Local 745" included Torres himself.

14. Tape

Torres complains that the jury was allowed to hear a self-serving statement made by Mungovan just before Mungovan started to record his conversation with Torres. The jury was appropriately instructed not to regard the statement as proof of any fact. Any error was harmless.

Torres also complains that the transcript of the tape was allowed to go into a jury room along with the tape. The jury was instructed that the tape was the real evidence, and that the tape would control in case of discrepancies. Further, only after the tape was played for the jury in open court was the jury allowed to take the transcript into the jury room. Torres has shown no inconsistency between the tape and the transcript. Accordingly, the district court committed no abuse of discretion. *Cf. United States v. Tornabene*, 687 F.2d 312, 317 (9th Cir. 1982); *United States v. Turner*, 528 F.2d 143, 167-168 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975) and 429 U.S. 837 (1976).

Affirmed.

Appendix B

United States District Court for
the District of Hawaii

Docket No. CR S2-01795-02

United States of America

vs.

William O. Nishibayashi
Defendant

[Filed July 15, 1983]

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 15, 1983.

COUNSEL

☐ Without Counsel

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived presence of counsel.

☒ With Counsel

Lloyd Asato, Esq.

PLEA

☐ Guilty, and the court being satisfied that there is a factual basis for the plea,

☐ Nolo Contendere,

☒ Not Guilty

FINDING & JUDGMENT

There being a verdict of

☐ Not Guilty. Defendant is discharged.

☒ Guilty.

Defendant has been convicted as charged of the offense(s) of having on or about February 18, 1981 and March 5, 1981 willfully and knowingly stated and subscribed to material matter which he did not believe to be true as charged in each of Counts I, II and III of the Superseding Indictment, and knowingly and willfully made a false writing and document containing a matter within the jurisdiction of the National Labor Relations Board, as charged in Count IV of the Superseding Indictment, all in violation of 18 U.S.C. 1621 and 18 U.S.C. 1001, respectively.

SENTENCE OR PROBATION ORDER

As to each of Counts I, II, III & IV:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of THREE (3) Years; and on condition that defendant be confined in a jail type or treatment institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of THREE (3) YEARS to commence upon the defendant's release from confinement, upon the usual terms and conditions of probation and upon the following special terms and conditions:

SPECIAL CONDITIONS OF PROBATION

1. that he pay a fine of $1,000 in such amounts and at such times as determined by the probation department, as to Count I only.

2. that his place of residence and employment be made known to and approved by the probation office.

3. that he commit no other violation of law.

Said sentences imposed on Counts II, III and IV to run concurrently with each other and with the sentence imposed on Count I.

MITTIMUS stayed to July 25, 1983 at 10:00 a.m.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

Signed by

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ DAVID W. WILLIAMS

Appendix C

UNITED STATES CONSTITUTION
AMENDMENT XIV
SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

TITLE 18—UNITED STATES CODE SECTION 1001

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appendix E

TITLE 18—UNITED STATES CODE SECTION 1621

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1746], willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Appendix F

RULE 12(b)(2)

Rule 12.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
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QUESTIONS PRESENTED

1. Whether false statements contained in affidavits filed in a federal district court and with the National Labor Relations Board were "material" within the meaning of 18 U.S.C. 1621 and 1001 when no judicial or administrative hearings were held.

2. Whether the trial court erred in summarily denying petitioner's mid-trial motion alleging vindictive and selective prosecution.

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TABLE OF AUTHORITIES

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1984. The petition for a writ of certiorari was filed on June 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621, and one count of making false statements, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of three years' imprisonment on each count. All but six months of the sentence was suspended in favor of three years' probation,

on the condition, inter alia, that petitioner serve the six months in a jail or treatment institution and pay a $1,000 fine. E.R., Tab C.R. 45.[1]

1. The evidence at trial showed that petitioner and Ralph Torres, both union officials, made false statements in affidavits filed in connection with a labor dispute. In January 1981, Walter Mungovan, the owner of C & W Construction, a general contracting firm in Maui, Hawaii, complained to the National Labor Relations Board office in Honolulu that the Carpenters Union was committing an unfair labor practice by picketing and threatening to picket his business for over 30 days for organizational purposes, without first having filed an appropriate petition with the NLRB (Tr. 36-38). If, as the union claimed, the picketing was informational, *i.e.*, intended not to organize but merely to advise the public truthfully about Mungovan's labor practices, the picketing was legal (Tr. 38).

Following an investigation, the NLRB filed suit against the union in the United States District Court for the District of Hawaii, seeking an injunction against the picketing. The district court ordered the union to respond to the Board's allegations by affidavit (S.E.R. 1-2). The union responded by filing an affidavit by petitioner, dated February 18, 1981, in which he described his investigation of Mungovan's construction projects and stated that Mungovan was not paying prevailing wage rates for carpentry work (S.E.R. 3-12).[2] Petitioner stated in the affidavit that "Local 745's only objective has been to have Mr. Mungovan comply with paying prevailing rates to his employees if they performed carpentry work" (S.E.R. 11).

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[1]"E.R." refers to the Excerpts of Record filed in the court of appeals; "S.E.R." refers to the Supplemental Excerpts of Record; and "Tr." refers to the trial transcript.

[2]This affidavit gave rise to the perjury charges in Counts 1 and 2 of the superseding indictment (E.R., Tab C.R. 13).

The NLRB failed to file affidavits with its complaint. The district court, acting in part in reliance on the union's affidavits, denied the Board's request for an injunction (S.E.R. 15-17, 18-20).

On March 2, 1981, Mungovan filed another charge against the union with the NLRB, claiming that the union had induced and encouraged individuals to engage in a strike, and had engaged in an illegal secondary boycott (S.E.R. 23). In response, the union submitted to the NLRB another affidavit executed by petitioner, dated March 5, 1981, in which he denied Mungovan's charges and stated that the only objective of the union's picketing of C & W Construction "has been to protest the substandard wages paid" (S.E.R. 24-25).[3] The union also submitted that affidavit to the district court in response to a second action brought by the NLRB against the union (see S.E.R. 21-22).[4] The NLRB proceeding and the district court action eventually were settled when the union agreed not to picket for a certain period of time (Tr. 53, 94).

Testimony by Mungovan and the head of the union and tape recordings of conversations between petitioner and Mungovan eventually established that the picketing of C & W Construction Co. was, contrary to petitioner's sworn submissions, intended to pressure Mungovan into signing a union contract. In meetings between petitioner and Mungovan in November and December 1980, petitioner repeatedly asked Mungovan when he was going to sign the union agreement; when Mungovan mentioned another non-union contractor, petitioner said they would make him sign even if they had to torch his jobs (Tr. 627, 635, 637). Neither

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[3]This affidavit gave rise to the false statement charge in Count 4 of the superseding indictment (E.R., Tab C.R. 13).

[4]This use of the March 5 affidavit gave rise to the perjury charge in Count 3 of the superseding indictment (E.R., Tab C.R. 13).

petitioner nor any other union agent ever discussed substandard wages and benefits with Mungovan (Tr. 629, 639, 673-674, 686). On the day Mungovan told petitioner he did not intend to sign the contract, the union sent Mungovan a letter stating that it would picket him (Tr. 638; S.E.R. 31).

Another union agent told Mungovan at one point that all the union was trying to do was to organize him (Tr. 661; S.E.R. 33-34) and that the union did not think Mungovan was paying substandard wages (S.E.R. 33; Tr. 779). Walter Kupau, the head of the union, admitted that he advised Mungovan, in a conversation in which they never discussed substandard wages, that the only way to settle the dispute was to sign an agreement (Tr. 368-371). Kupau also told Mungovan that "these business agents are doing a better job of organizing than any other business agents" (Tr. 372).

In a recorded conversation between petitioner and Mungovan on February 3, 1981, the two men talked extensively about whether Mungovan would sign a union contract (GX 42; S.E.R. 35-54). Petitioner told Mungovan that the union had signed eight contractors without picketing; petitioner made it clear that the union was determined to get Mungovan to sign an agreement and that this was the only way to end the picketing. The February 3 conversation did not include any discussion about substandard wages and benefits.

2. The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A6). The court concluded, inter alia, that petitioner's false statements were material to the NLRB and district court proceedings, since the issue in those proceedings was the union's intent in picketing (*id.* at A2), and that petitioner's claims of vindictive and selective prosecution were barred because they were not raised prior to trial (*id.* at A4).[5]

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[5]On July 11, 1984, Justice Rehnquist denied petitioner's application for a stay of the mandate in this case.

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the court of appeals erred in concluding that his false statements were material, since no judicial or administrative hearings or other deliberations were ever conducted. That contention is clearly without merit. The unpublished decision of the court of appeals does not warrant further review.

The court below applied the same test of materiality that other courts of appeals have consistently employed. As the court below noted (Pet. App. A2), that test is a broad one —whether the false statement was capable of influencing the tribunal on an issue before it. It is not necessary to show that the statement actually impeded an investigation or that it related to the primary subject of the investigation. It is enough to prove that the statement was relevant to any issue under consideration and that the falsity of the statement would have the natural tendency to influence the investigation or determination of the tribunal. See, *e.g.*, *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981); *United States* v. *Ponticelli*, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); *United States* v. *Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980); *United States* v. *Howard*, 560 F.2d 281, 284 (7th Cir. 1977); *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976). All of the cases cited by petitioner (Pet. 5-6) have employed this standard formulation of materiality.

The court of appeals was clearly correct in concluding that petitioner's statements satisfied the traditional test for materiality. As the court pointed out (Pet. App. A2), the union's intent in picketing was at issue in all of the proceedings in this case. Petitioner's false statements that the union was picketing to protest substandard wages were obviously material, since they could have influenced the determinations of the NLRB and the court concerning the union's intent.

Petitioner contends, however, that his statements could not have been material because the tribunals in which he filed his affidavits never conducted any proceedings or deliberations. Petitioner apparently is referring to the fact that both the court actions and the proceedings before the NLRB eventually were dismissed or settled without any evidentiary hearings. But the fact that no such hearings were held does not mean that petitioner's affidavits were not capable of influencing the tribunals with which they were filed. Indeed, the district court specifically ordered filing of the affidavits in connection with its determination whether to grant the injunction requested by the Board, and it dismissed the NLRB's initial suit for injunctive relief in reliance on the first affidavit of petitioner submitted by the union. The false statements in the affidavits also had the capacity to affect the disposition of the second action filed by the Board, including the outcome of settlement negotiations. Thus, although the district court concluded that it was unnecessary to hold an evidentiary hearing, there is no doubt that petitioner's statements were made in connection with court proceedings and that they had the capacity to influence (and in fact did influence) the disposition of those proceedings.

The false statement charge involving the affidavit submitted to the NLRB was brought under 18 U.S.C. 1001. Section 1001 does not require that a false statement be made in the course of administrative hearings; statements that affect an agency's investigative functions may form the basis for a Section 1001 violation. See *United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984). Petitioner's false statement about the union's motive in picketing was clearly material to the Board's investigation of Mungovan's charges, since it could have affected the outcome of that investigation.

2. Petitioner also contends (Pet. 7-8) that the district court erred in summarily dismissing as untimely his motion claiming vindictive and selective prosecution. Petitioner cites *Fallen* v. *United States*, 378 U.S. 139 (1964), in support of his claim that the court should have considered the circumstances that caused his late filing of the motion, instead of applying the rules of procedure inflexibly. But in fact the district court did consider petitioner's substantive arguments. The court concluded that the information petitioner offered in support of his claim showed only some contradictory testimony and clearly did not make out a vindictive or selective prosecution claim (E.R., Tab T.1, at 601-604). The court quite properly declined to conduct any further hearing on this patently invalid claim.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]In any event, the court of appeals was clearly correct in concluding (Pet. App. A4) that petitioner's claims need not be considered because they were not raised prior to trial, as required by Fed. R. Crim. P. 12(b). Petitioner makes the conclusory statement (Pet. 7) that his claims were based on facts uncovered during trial; however, he does not state what those facts were or explain why they were necessary predicates to his claims of vindictive or selective prosecution. Of course, petitioner's situation in no way resembles that of the incarcerated petitioner in *Fallen*, who, acting without the benefit of counsel, missed the 10-day deadline for filing of a notice of appeal because a prison mailing system operated in a manner that was beyond his control.

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